

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL SESSIONS CASE NUMBER 12 of 2010

REPUBLIC

VS

SAMWEL S/O HENRY @ JUMA

JUDGMENT

Date of last Order: 18-03-2011

Date of Judgment: 25-05-2011

JUMA, J.:

Samwel s/o Henry @ Juma is charged with the offence of murder, contrary to section 196 of the **Penal Code [Cap 16 R.E. 2002]**. The particulars of the charge; as set out in the Charge Sheet dated 15th January 2009, are that on or about 22 November 2008, at Mwanambaya village within Mkiiranga District, in Coast Region, the accused murdered Elizabeth d/o Martin Kambi.

The accused's plea was taken both at the preliminary hearing on 28 June 2010 and also when the hearing of this case begun on 14 March 2011. On both occasions the accused pleaded "**Not Guilty**" to the count of

murder. The case was sat down for hearing from 14th to 18th March, 2011 in presence Zena Saidi Mbwana, Fatuma Mkinga and Rehema Mbanyitwe the three Lady Assessors. Prosecuting was led by Ms Anne Malipula, the learned State Attorney. Other learned State Attorneys in the team; included Ms Lucy Diganyck, Mr. Denis Ignas and Mr. Mbute Akarro. The accused was represented by two learned Advocates, Mr. Godfrey Mapunda and Mr. Allen Mwakyoma. During the trial the prosecution called a total of ten (ten) witnesses in support of its case. The accused person testified on oath in his own defence.

The evidence tendered in this court shows that for two years before 22nd November 2008 the accused person and Elizabeth d/o Martin Kambi, lived together at Mwanambaya Village (Mkuranga District). In his evidence the accused person described how he met and fell in love with Elizabeth at Mwanambaya village. Witnesses described their relationship as that of a fiancé and a fiancée (*wachumba*). From the very beginning their relationship was at best tenuous because the accused and the deceased quarrelled and fought frequently. In his evidence the accused person had explained that it was jealousy which was the source of their misunderstanding and frequent disagreements. Accused was angered by the apparent attempt by the deceased to rekindle her love affair with Fanuel Mapenza (D) Matia, her former lover.

The extent of their frequent fights is illustrated by evidence confirming that the accused and the deceased, had even gone to their Kitongoji

Chairman (PW8 Abdallah Suleiman Mdogwa) three times to solve their dispute. Matters got worse. In July 2008 the deceased filed complaints with police for assaulting her. The accused was arrested and taken to the primary court. He was convicted and ordered to pay a fine of TZS 20,000/- or serve a one year prison sentence. He could not immediately raise the fine. He began serving his prison sentence. The accused stayed in prison for only two weeks because the fine was paid and he returned back to live with the deceased. Some witnesses including (PW1) testified that it was the deceased who had actually took pity to the accused and paid the fine. The accused in his evidence testified that the deceased paid the fine out of the deep love she had for him.

Fights between the accused and the deceased continued unabated. Exasperated by frequent quarrels and misunderstandings with her lover, the deceased wanted to end their relationship once and for all. She requested a meeting with the village elders. The meeting of elders which took place on 21-11-2008 agreed that the accused and the deceased should end their cohabitation and relationship by parting company and division of their property. Amongst those who attended this meeting was Lucas Simon- PW1 (the son of the deceased), Ally Nassoro Ngomange (PW10), Moshi Mfaume (PW5), and a 71 year old Abdallah Suleiman Mdogwa (PW8). It was PW8 who on three earlier occasions had tried without success, to reconcile the couple. According to the evidence of PW1, PW5 and PW 10, the accused was paid the TZS 6,000/= before he left. The deceased also left the house she was living in with the accused.

She went to live with her children in another house where her son (PW1) lived with his children.

In the statement he made to the Justice of the Peace (Adinan Musa - PW3), the accused maintained his stance the deceased owed him TZS 1,700,000/= which he had earlier given her to buy a plot of land he planned to construct a house on. Accused claimed that it was after he had demanded back his money, when the deceased convened the 21-11-2008 meeting of the elders. This version of the accused person is strongly disputed by several witnesses who had attended that meeting of elders.

While summing up to the case to Zena Saidi Mbwana, Fatuma Mkinga and Rehema Mbanyitwe the three Lady Assessors, I took pain to emphasise to them that the accused bore no burden whatsoever in this case to satisfy this court of his innocence. I asked them to be guided by the principle of law that an accused ought to be convicted only on the strength of the prosecution case. A suspicion alone cannot sustain a conviction. Suspicion entitles an accused person to an acquittal, on a benefit of doubt.

From evidence tendered by both the prosecution as well as the defence, three issues stand out for my determination. The first issue is whether the deceased was unlawfully killed. The second issue is whether that unlawful killing amounted to murder. The final issue is whether it was the accused person who is responsible. With respect to the issue whether the

deceased was unlawfully killed there is the evidence of PW2 (Harrison Peter Mjema) who conducted a post-mortem examination of the body of Elizabeth Kambi; and his report was admitted as **Exhibit P1**. According to his evidence and the evidence of the post-mortem examination report; it was a severe haemorrhage that caused the death of Elizabeth Martin Kambi. Upon examining the body of the deceased, PW2 found a big wound on the left side area around her chest. It was a wound that was 3 centimetres deep enough to scratch the heart of the deceased; causing her to lose so much blood. PW9 Enerisha Issaya Mchomvu was a neighbour of the deceased and her children. He was at that fateful morning awakened by the wailing sounds of the children mourning the death of their mother.

At the scene of crime, PW9 and other neighbours found a large pool of blood. The scene was akin to a slaughter place. PW9 alerted the police to the murder. PW4 Detective Constable Nisile together with Assistant Inspector Mathias Ndimubenya (PW6), were the first police officers at the scene of crime. This team of police officers uncovered the body and saw wounds under her chest and under her breast. PW 6 searched the scene of crime and found a knife which was admitted as **Exhibit P4**. From the foregoing evidence, there is no doubt at all that the deceased Elizabeth Martin Kambi died a violent and an unnatural death.

Let me now go on to the issue whether it was the accused person who is responsible for the death of the deceased. On this issue I reminded the

Lady Assessors to take into account that the evidence of the accused who had claimed that the death of the deceased was an accidental death resulting from a push. I wanted the Lady Assessors to contemplate the question whether the defence of accident is from the totality of evidence tendered in court, is available to the accused.

Having said so much, there is no doubt from evidence that the accused was at the scene where the deceased met her death in the early morning of 22-11-2008. The accused person himself does not in his evidence dispute that indeed he was at the scene of crime when the deceased died. However, there are two versions of evidence as to what really happened at around 5 a.m. on that fateful morning of 22-11-2008. The first version, begins with the evidence of PW1 (Lucas Simon) on how early that morning the deceased left her son's house armed with a torch and a dark bucket. It was the time of the year when mango harvest takes place. The deceased was heading out to the farm where she was employed as a farm help. She was going to collect ripe mangoes which had fallen down over the night. Five minutes later, PW1 heard a cry for help- *"I am dying..... I am dying."* It was his mother's voice. PW1 rushed out together with his other relatives. They found his mother covered in blood and swaying in desperation, agony and pain. PW1 also saw the accused running away. PW1 got hold of his mother before she could fall down. The deceased died soon thereafter.

Testifying in his own defence as DW1, the accused would like this court to believe his version of the events leading up to the death of the deceased. The accused's version of evidence is clear from both his testimony in court and also in the extra-judicial statement he made to a Justice of the Peace which was admitted as **Exhibit P2**. According to the accused; after the meeting of village elders the previous day (i.e. 21-11-2008), he went to his place of business where he sold local brew. His plan was to sleep over and then to travel to Kiparang'anda the following day. His "second" wife Sauda Kapapa; lived at Kiparang'anda.

Accused concedes that on 22-11-2008 he left his place of business at 5 a.m. in the morning. Accused maintains that it was a sheer coincidental chance that he met up with the deceased that same morning. The two walked together, with the accused trying to apologize and telling the deceased how much he still loved her. Once again, the two former lovers failed to reach any compromise. The accused alleges that the deceased begun to insult him using unprintable insults. She also bit his thumb and slapped him. The accused retaliated back using a stick. The deceased fell down on a tree stump crying for help. The cry attracted her son and her other relatives to the scene. According to the accused, it was that fall on a tree stump which was the source of her fatal injuries. This version of evidence is also contained in the cautioned statement the accused made to the justice of the peace. It was admitted as **Exhibit P2** without any objection from the accused.

While responding to questions put out to him by Lady Assessors, the accused insisted that death of the deceased was due to an accident. All the three assessors did not believe this version where in the accused is suggesting a defence of accident. The assessors were unanimous that it was the accused who; with ill intention caused the death of the deceased. The Lady Assessors did not agree that a mere slap on the face of the deceased followed up with a fall on a tree stump would cause the nature and type of injuries which the deceased sustained. I respectfully agree fully with the opinion of the Lady Assessors. Weighed up against the evidence of other witnesses, the defence of accident does not arise. It is clear in my mind that the accused person intentionally caused the death of the deceased.

Having found that the accused of malice aforethought caused the death of Elizabeth d/o Martin Kambi, the defence of accident does not arise. Further, I do not for once believe the suggestion by the accused that it was a mere chance he met up with the deceased that fateful morning of 22-11-2008 at the scene of crime. I am of the opinion that the accused person was at the scene to implement his premeditated plan to either kill the deceased or cause her a grievous bodily harm. The accused having lived with deceased for so long, must have been aware of her working habits of waking up early in the morning to collect the seasonal mangoes from her employer's farm.

There is another reason which leads me into my finding that the accused was not a witness of truth when he testified on his own version of events built around the accidental death of the deceased. In his evidence in chief and upon cross examination the accused had conceded that the statement he made to the Justice of the Peace was a true account of what transpired. Yet, his testimony as DW1 and what he told Adinan Musa (PW3) the justice of the peace (in **Exhibit P2**), are conflicting at some important areas. For example, whereas he testified that he was alone with the deceased when he pushed her to fall on a tree stump, the accused told the Justice of the Peace that around 6 a.m. on the day the deceased died, the son of the deceased had threatened him with a bush knife. The accused told the justice of the peace that the deceased died when she joined the fight on the side of her son and she fell down injured when the accused fought back. These conflicting accounts confirm my opinion that the accused was not a witness of truth.

PW2 – Harrison Peter Mjema who conducted a post-mortem examination at the scene, saw one spot with lots of blood. It was the spot where the body of the deceased fell. When PW2 checked her body she saw a wound on her left side under her breast. He also saw another wound on her body underneath the first wound. The two wounds are not consistent with a fall on a tree stump. According to PW2, the wound must have been caused by a sharp object and it was consistent with a knife wound. It is my finding and I hereby hold that the knife, which Mathias Ndimubenya (PW6) found at a nearby scrub; was the weapon which the

accused had used to kill the deceased. The knife had no blood mark. It was as if it was once dumped into water to erase traces of blood. In my opinion and finding, evidence on record is more consistent with version that injuries sustained by the deceased were occasioned by sharp object like a knife but not from a fall on a tree stump.

Having found that the deceased met a violent and unlawful death, the following issue for my determination is whether the prosecution has led sufficient evidence to prove that it was the accused who with malice aforethought caused the death of the deceased. According to section 200 of the **Penal Code (Cap 16 R. E. 2002)**, malice aforethought shall be deemed to be established by evidence proving any one or more of the four circumstances enumerated under paragraphs (a) to (d) of section 200:

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years;

(d)an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence.

From evidence in the present case, the paragraph in section 200 which is relevant for purposes of my determining whether there was malice aforethought is:- *(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not.*

Court of Appeal has furnished useful guidelines on how to determine malice aforethought. In the case of **Saidi Ally Matola @ Chumila Vs. R, Criminal Appeal No. 129 of 2005** wherein Court of Appeal cited with approval its earlier decision in **Enock Kipela v Republic, Criminal Appeal No. 150 of 1994 (unreported)**; the Court of Appeal was aware that invariably, an accused will not agree that he or she had the intention to cause death or grievous bodily harm to the deceased. But that intention can be ascertained by trial court from various factors,

".....including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

Applying the above-mentioned guiding factors in determining the existence of malice aforethought, the following picture emerges. With respect to the type and size of the weapon used in the attack of the deceased, there is evidence showing that a knife was used to inflict a big wound on the left side area of the chest. It was a wound that was 3 cm deep. And it was so deep as to scratch the heart, causing the deceased to lose so much blood. The injury deceased sustained was directed on the left side of her chest where such a vital and vulnerable organ of the body like a heart is. By inflicting the injury at such vulnerable part of the body, the accused must have intended to cause either grievous harm or death of Elizabeth Martin Kambi. I do not believe the account made by the accused that death of the deceased was a result of an accident following her fall on a tree stump. If it were an accident, the conduct of the accused would have been different. He would not have found it difficult to report to the police. He instead vanished from the scene till his arrest nine months later on 8/1/2009. The conduct of the accused before the incident is an important factor which manifests the malice aforethought. Although the accused and the deceased were formally separated by a council of elders only the previous day, yet he had the audacity to follow up on the deceased the following morning. The accused has not satisfactorily explained what took him to the farm early that fateful morning; where from his knowledge and experience of the mango-harvesting season, he knew the deceased was also out that early morning collecting seasonal mangoes.

There is cogent and credible evidence which when pieced together or taken cumulatively, irresistibly point to the conclusion that it was the accused person who committed the offence of murder and no one else. All the the three Lady Assessors are of the unanimous opinion that the accused with malice aforethought killed the deceased. I respectfully share their opinion. I have no doubt in my mind that the prosecution has established beyond reasonable doubt that the murder of the deceased by the accused was actuated by malice aforethought. The accused is found guilty of murder contrary to section 196 of the Penal Code and is convicted accordingly.



**I.H. Juma,
JUDGE
25-05-2011**

Mr. Akarro, the learned State Attorney for Prosecution

This is a serious offence. It is clear that the accused was not satisfied with the decision of the elders to separate him from the deceased. A stiff punishment should be meted out to deter others from committing similar offence.

Mr. Mapunda, the learned Advocate for Defence

The law has prescribed only one punishment, i.e. capital punishment. We leave it to the Court to prescribe appropriate punishment. The accused intends to appeal to the Court of Appeal of Tanzania.



**I.H. Juma,
JUDGE
25-05-2011**

Sentence

There is only one punishment for the offence of murder. I hereby sentence the accused to death. I do so under section 197 of the **Penal Code, Cap 16 R.E. 2002**. I direct the accused should suffer death by hanging. I so direct under section 322 (2), of the **Criminal Procedure Act, Cap 20 R.E. 2002**.



**I.H. Juma,
JUDGE
25-05-2011**

Court

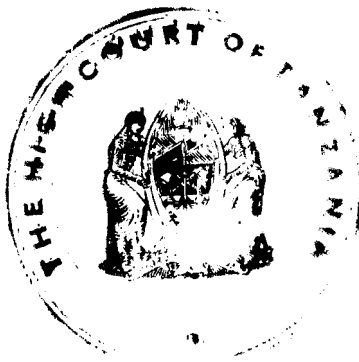
Accused has been informed of his right of appeal under section 323 of the **Criminal Procedure Act, Cap 20 R.E. 2002** by giving notice of his intention to appeal within ten days from the date of judgment and also lodging petition of appeal within 45 days from the date of judgment or from the date of obtaining a copy of the proceedings.



**I.H. Juma,
JUDGE
25-05-2011**

Court

The judgment has been delivered and sentence passed in open court in Dar es Salaam today, 25th day of May 2011.



**I.H. Juma,
JUDGE
25-05-2011**